No. 96-1527

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

AMRUT N. PATEL and SITA PATEL,

Petitioners,

vs.

JAMES F. PENMAN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

The petition essentially presents two questions for review. Both present moot issues since any resolution of either question will not affect the Ninth Circuit's opinion:

1. Petitioners ask this Court to review the standards for dismissal of state law claims under 28 U.S.C. § 1367(c). Although there are some minor disagreements among the circuits on the precise contours of the standard for dismissal, the district court's dismissal of state law claims in this case was proper under the standard of all circuits and under the plain language of the statute. To the extent any conflict exists, petitioners received review under the standard most favorable to their position.

2. Petitioners request this Court to decide whether their Fourth Amendment claim "controlled" over their Fifth Amendment claim. Plaintiffs never alleged a Fourth Amendment claim and the Ninth Circuit never decided whether a Fifth Amendment claim "controlled" over a Fourth Amendment claim. The petition is based on an issue not presented by the pleadings and never addressed by the Ninth Circuit.

PART I

"What standard of discretion governs a district court's decision to decline to exercise supplemental jurisdiction over a claim under 28 U.S.C. § 1367(c)?"

"Did petitioners' supplemental claim brought under 28 U.S.C. § 1367(c) substantially predominate over the original jurisdiction claims brought under 42 U.S.C. § 1983?"

The first two questions in the petition present the same issue: what is the proper standard for dismissal of supplemental state law claims under 28 U.S.C. § 1367(c)? This is not the proper case to decide the issue since under any conceivable interpretation of the statute, dismissal of the supplemental state law claims was proper in this case. There are in fact minor disagreements among the circuits

about the precise standard for dismissal of state law claims under § 1367. But none of the minor disagreements is relevant to this case since the district court's order was proper under the law of any circuit.

The only supplemental state law claim petitioners filed was inverse condemnation under the California Constitution. (See petition, pages 5-6) At the time this state law claim was dismissed, the only remaining federal claims were a procedural due process claim and a substantive due process claim. (See petition, page 6) The substantive due process claim was also dismissed before trial. (See petition, page 6) The only issue tried was whether the City had violated petitioners' procedural due process rights by denying them a post-closure hearing. (See petition, pages 6-7)

The circuits which have considered the issue are in accord that if a district court has jurisdiction over a supplemental state law claim, it may decline to exercise its jurisdiction only if one or more of the factors specified in section 1367(c) is met. *Executive Software United States, Inc. v. United States District Court*, 24 F.3d 1545, 1555-1556 (9th Cir. 1994) ("a court can decline to assert supplemental jurisdiction over a pendent claim only if one of the four categories specifically enumerated in section 1367(c) applies"); *McLaurin v. Prater*, 30 F.3d 982, 984 (8th Cir. 1994) ("The statute plainly allows the district court to reject jurisdiction over supplemental claims only in the four instances described therein"); *Palmer v. Hospital Authority*, 22 F.3d 1559, 1569 (11th Cir. 1994) ("supplemental jurisdiction must be exercised in the absence of any of the four factors of section 1367(c)").

Petitioners contend there is a conflict in the circuits whether a district court has discretion to dismiss supplemental state claims on grounds other than as specified in § 1367. In fact, although a few cases decided shortly after § 1367 was enacted considered that

question without deciding it, it is now settled that discretion comes into play only after the district court finds one of the § 1367(c) factors applicable. The Ninth Circuit follows this settled rule. *Executive Software*, 24 F.3d at 1555-1558; *O'Connor v. State of Nevada*, 27 F.3d 357, 363 (9th Cir. 1994), *cert. den.* 115 S.Ct. 1367.

The district court identified factors specified in three of the four subdivisions of § 1367(c) in support of its decision. Under the law of every circuit that has considered the issue, dismissal was proper under all three grounds. Again, there is no conflict for this Court to resolve.

A. THE STATE LAW CLAIM PREDOMINATED OVER THE FEDERAL CLAIMS

Section 1367(c)(2) allows dismissal if the state law claim "substantially predominates over the claim or claims over which the district court has original jurisdiction." Petitioners' state law inverse condemnation claim does in fact substantially predominate over the procedural due process claim:

1. The factual issues are completely different. The factual issue on the federal due process claim is whether adequate notice of a post-closure hearing was given, and if not, whether the lack of notice caused any damages. Petitioners expressly abandoned any issues about whether the hotel was properly closed. (Petition, page 6) In contrast, the factual issue on the state inverse condemnation claim is whether the hotel was properly closed.

2. The legal issues are different. The legal issue on the federal due process claim is what notice was required. The legal issue on the state inverse condemnation claim is whether petitioners' property was taken or damaged for public use within the meaning of the California Constitution.

The district court properly noted the different factual and legal issues as part of its basis for dismissing the supplemental state

law claim. (Petition, page 32a) These are proper grounds under the law of every circuit to consider the issue. *Diven v. Amalgamated Transit Union & Local 689*, 38 F.3d 598, 602 (D.C. Cir. 1994) (state law claims were more complex and required more judicial resources than did federal claims); *Soliday v. Miami County*, 55 F.3d 1158, 1165 (6th Cir. 1995) (state claims were "distinct and separable" from the federal claims); *Winn v. North American Phillips Corp.*, 826 F.Supp. 1424, 1425-1426 (S.D. Fla. 1993) (state law claims "require completely different elements of proof"); *In re Synergen, Inc. Securities Litigation*, 154 F.R.D. 265, 268-269 (D. Col. 1994) (negligent misrepresentation claim predominated over federal securities claim). The district court's decision is consistent with these cases.

B. THERE ARE "NOVEL AND COMPLEX ISSUES OF STATE LAW"

28 U.S.C. § 1367(c)(1) authorizes dismissal of supplemental state law claims if such claims involve "novel and complex issues of state law." Petitioners essentially alleged a regulatory taking of property by means of improper code enforcement. The contours of a California inverse condemnation claim in a case of this type are unsettled. California does not authorize an inverse condemnation action for damage caused by ordinary law enforcement efforts; the remedy is an action in tort. *Customer Co. v. City of Sacramento,* 10 Cal.4th 368, 378 (1995), *cert. den.* 116 S.Ct. 920 ("section 19 . . . never has been applied to require a public entity to compensate a property owner for property damage resulting from the efforts of law enforcement officers to enforce the criminal laws"). It requires a challenge based on regulatory action to be by way of a petition for writ of mandate or declaratory relief. *Hensler v. City of Glendale*, 8 Cal.4th 1, 13-14 (1994), *cert. den.* 115 S.Ct. 176. It allows a plaintiff to claim a permanent regulatory taking only if, after a temporary

taking is found, the public entity decides not to rescind its actions. *Hensler*, 8 Cal.4th at 14. The application of these rules to an action of this type is unsettled. A federal court attempting to decide these issues would have no basis for determining how a California court would rule.

Subdivision (c)(1) was designed to allow dismissal in cases of this type in order to eliminate the need for federal judges to attempt to predict the future course of state law when there is no reasonable basis for doing so. The circuits which have addressed the issue uniformly find dismissal proper when there is no settled state law to follow. *O'Connor v. State of Nevada*, 27 F.3d 357, 363 (9th Cir. 1994), *cert. den.* 115 S.Ct. 1367 (it is a novel and complex issue of state law whether a requirement that judicial candidates be attorneys violated the state constitution); *Doe v. Sundquist*, 106 F.3d 702, 708, n. 1 (6th Cir. 1997) (it is a novel and complex issue of state law whether disclosure of sealed adoption records violated state law); *Angelmyer v. Hamilton County Hospital*, 58 F.3d 533 (10th Cir. 1995) (it is a novel and complex issue of state law whether a hospital violated the Kansas Risk Management Act); *Chandler v. Miller*, 73 F.2d 1543, 1546, n. 3 (11th Cir. 1996), *reversed on other grounds*, ___ U.S. ___, 1997 WL 176382 (it is a novel and complex issue of state law whether a drug testing policy violates the Georgia constitution). The district court's order is consistent with decisions from every circuit to consider the issue.

C. THERE ARE "OTHER COMPELLING REASONS" FOR DECLINING DISMISSAL

Section 1367(c)(4) allows dismissal if there are "other compelling reasons for declining jurisdiction." This standard is also met under the law of any circuit to consider the issue:

1. The trier of fact is different. The trier of fact on the federal due process claim is the jury. *U.S. Constitution, Seventh*

Amendment. The trier of fact on the state inverse condemnation claim is the court sitting without a jury. Only if the court finds liability does the jury decide the amount of damages. *Coachella Water District v. Western Allied Properties, Inc.*, 190 Cal.App.3d 969, 974 (1987). If the district court had not dismissed the state inverse condemnation claim, it would have been required to conduct a separate court trial on the state law liability issues in advance of a jury trial on any remaining damages issues.

2. The measure of damages is different. On the federal due process claim, the damages are based on the harm caused by the lack of notice. See *Carey v. Piphus*, 435 U.S. 247 (1978) (absent proof that a hearing would have changed the result, the lack of a required hearing is a basis only for nominal damages). On the state inverse condemnation claim, the damages are based on the fair market value of the property taken by the government. *Housley v. City of Poway*, 20 Cal.App.4th 801, 807-808 (1993). Thus the potential damages on the state inverse condemnation claim are not only different but potentially greater than those available under federal law. The federal claim only concerns procedures while the state claim involves the substance of the City's action.

The district court noted the different trier of fact and the different theories under state and federal law. (Petition, page 32a) These are proper grounds for dismissal under subdivision (c)(4) under the law of any circuit to consider the issue. See *Hays County Guardian v. Supple*, 969 F.2d 111, 124 (5th Cir. 1992), *cert. den.* 506 U.S. 1087 (it is proper to dismiss supplemental state claims when related claims are pending in state court); *Hirschinger v. Allstate Ins. Co.*, 884 F.Supp. 317, 320-321 (S.D. Ill. 1994) (state and federal claims had different triers of fact).

D. SUMMARY

Although petitioners present this case as a vehicle for

resolving a conflict among the circuits, there is in fact no conflict to resolve. The circuits are in accord on all issues of any significance; the minor differences in the application of the uniform standard are not relevant to this case. To the extent any conflicts exist, petitioners received review under the law most favorable to their position.[1] There are no issues for this Court to address.

PART II

"Did petitioners' Fifth Amendment claim under the Fourteenth Amendment control over their Fourth Amendment claim under the Fourteenth Amendment?"

This question is based on a complete misunderstanding of the Ninth Circuit's opinion. The Ninth Circuit never considered whether a Fifth Amendment claim "controlled" over a Fourth Amendment claim. The question presented for review is not based on any issue presented by the pleadings or decided by the Ninth Circuit.

The Ninth Circuit actually addressed a completely different issue concerning substantive due process. The due process clause supports three completely different types of claims:

1. Claims based on the procedures used. These are referred to as procedural due process claims.

2. Claims based on the provisions of the Bill of Rights for which the due process clause is simply the means of application to the states.

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[1]For example, petitioners contend their state law claims should have been dismissed only if authorized by § 1367(c) and not based on general discretionary factors. (Petition, page 12) The Ninth Circuit follows this rule. *Executive Software*, 24 F.3d at 1556-1557. It applied it in this case. (Petition, page 20a-21a)

3. Claims challenging the substance of a decision, rather than the procedures which led to it, based directly on the due process clause. See *Daniels v. Williams*, 474 U.S. 327 (1986) (Justice Stevens concurring); *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 812-813 (1994) (plurality opinion).

This Court has devised a detailed set of tests for deciding claims based on the specific provisions of the Bill of Rights. Some lower courts allowed plaintiffs to bring "substantive due process claims" as alternatives to claims based on the specific provisions of the Bill of Rights. The tests used to decide these substantive due process claims were different than, and in some cases inconsistent with, the tests used to decide claims based directly on the Bill of Rights.

In a series of cases, this Court held that if a provision of the Bill of Rights applies to a specified factual situation, the tests developed under that portion of the Bill of Rights should be applied rather than "general notions of substantive due process." *Graham v. Conner*, 490 U.S. 386 (1989) (pre-conviction excess force cases are analyzed under the Fourth Amendment, not "the more generalized notions of 'substantive due process'"); *Whitley v. Albers*, 475 U.S. 312 (1986) (post-conviction claims of use of excessive force are analyzed under the Eighth Amendment, not the due process clause); *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) ("the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended"); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 521, n. 25 (1981) ("the Due Process Clause does not afford a greater degree of protection to appellant's business than does the First Amendment"); *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 811 (1994) (plurality opinion)

("We hold it is the Fourth Amendment, and not substantive due process, under which petitioner Albright's [malicious prosecution] claims must be judged").

In *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc), the Ninth Circuit followed this line of cases.

> "Because the Fourth and Fifth Amendments provide explicit limitations on the type of government conduct challenged by the plaintiffs, *Graham* dictates that those Amendments, not the Fourteenth Amendment's guarantee of substantive due process, should guide the analysis of the plaintiffs' claim." 75 F.3d at 1320.

The opinion of the Ninth Circuit below, which followed the en banc opinion in *Armendariz*, simply applied this holding to the facts of the present case.[2] Petitioners alleged a substantive due process claim. The Ninth Circuit determined that since the conduct alleged under petitioners' substantive due process claim was covered by the "explicit limitations" of the Fifth Amendment, petitioners could not bring an independent substantive due process claim.

> "Here, the Patels challenge government conduct that is explicitly limited by the Takings Clause of the Fifth Amendment. . . . Because the Patels' substantive-due-process claim is preempted under *Graham* by the Takings Clause, we affirm the district court's grant of summary judgment on this claim." (Petition, pages 15a and 17a, footnote omitted)

Petitioners contend the Ninth Circuit decided the Fifth

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[2]The Ninth Circuit opinion in this case was written by the author of the lead opinion in *Armendariz*.

Amendment claim "controlled" over their Fourth Amendment claim. The Ninth Circuit actually addressed a completely different issue. In *Armendariz* the court found the plaintiffs' substantive due process claim preempted by the explicit textual provisions of both the Fourth and the Fifth Amendments. In the Ninth Circuit opinion below, the court decided that since the substantive due process claim was preempted by the Fifth Amendment, and since no Fourth Amendment claim was alleged, there was no need to decide whether it was also preempted by the Fourth Amendment.

> "The *Armendariz* court found the plaintiffs' substantive due process claim in that case preempted by both the Fourth and Fifth Amendments. 75 F.3d at 1318. Because the Patels' substantive due process claim is clearly preempted by the Fifth Amendment, we do not analyze whether the Fourth Amendment claim might also preempt their substantive due process claim." (Petition, page 16a, n. 7)

In short, the issue presented by the petition is not supported by the pleadings (there never was a Fourth Amendment claim), was never presented to the Ninth Circuit, and was never considered by the Ninth Circuit.[3] There is nothing for this Court to review.

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[3]The language of the petition is based on *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). The Ninth Circuit follows the holding of *James Daniel Good Real* that more than one amendment can apply to a single case. *Armendariz*, 75 F.3d at 1320. Its holding in *Armendariz* and the opinion below is only that a plaintiff may not pursue an independent substantive due process claim when the alleged conduct is within the scope of a specific constitutional provision. This holding is fully consistent

CONCLUSION

This petition presents moot issues. The order dismissing the supplemental state law claim is proper under the law of any circuit; there is no conflict to resolve. The other question for review is based on a complete misunderstanding of the Ninth Circuit's opinion and is not based on any issue considered or decided by the Ninth Circuit. For all the foregoing reasons it is respectfully submitted that the petition should be denied.

Respectfully submitted,

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